IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 479

WONG SUN and JAMES WAH TOY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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Principal Question:

Are federal agents permitted to avail themselves of information obtained from a defendant following his illegal arrest?

Related Questions:

1. Is a confession made by a defendant following his illegal arrest, the product of the illegal arrest and as such inadmissible in the trial against him?

2. Is a defendant's confession sufficiently corroborated by evidence of narcotics found in another person's home?

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 21, U.S.C. Section 174, provides:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported

or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 28, U.S.C. Section 1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Statement

An indictment in two counts returned in the United States District Court for the Northern District of California charged petitioners with conspiracy to violate the narcotic laws, and with concealment and transportation of heroin in violation of 21 U.S.C. 174 (R. 4). After waiver of jury trial, petitioners were found guilty by the court on the substantive count (R. 122). Petitioner Toy was sentenced to imprisonment for five years, and petitioner Wong Sun for ten years (R. 123).

1. *Summary of the evidence:*

On June 4, 1959, at about 2 o'clock A. M. Hom Way, whom one of the agents had known for six weeks, was arrested by federal narcotic agents in possession of narcotics. Hom Way was questioned and about 5:30 A. M.

told the agents he purchased an ounce of heroin the night before from a person known as "Blackie Toy" who operated a laundry on Leavenworth Street in San Francisco. This was the first time Hom Way had ever given information as to narcotic traffickers or violations or dealers in narcotics (R. 54-56).

At 6:30 A. M. the federal agents arrived at the closed premises on Leavenworth Street operated by petitioner Toy as a laundry in front and occupied as living quarters in the rear. One of the agents, a Chinese, knocked on the locked glass door and rang the bell. Toy, who was asleep with his family in the rear living quarters, came into the front laundry section and unlocked and opened the front door part way and told the agent, who asked for his laundry, he was closed and to come back, that he didn't open until 8:30.

There is some conflict as to what immediately followed. Toy testified he then closed and locked the front door and as he started toward his living quarters the agents, about seven in number, broke in and pursued him through the laundry and into his bedroom where the agents identified themselves and handcuffed him and then thoroughly searched the premises (R. 31-38).

Agent Wong testified that he got the front door half way open and then pulled out his badge and said he was a federal narcotic agent, whereupon Toy slammed the door and started running inside his living quarters; that he then pursued him to his bedroom, drew his gun, placed him under arrest and handcuffed him (R. 51-2).

The agent admitted, however, he used force to open the front door (R. 53) and Toy testified the agent broke in (R. 38); Toy's wife was available to testify as to the condition of the front door both before and after the entry of

the agents, and the government stipulated the door and lock were damaged by the entry of the agents (R. 48).

After Toy was placed under arrest and handcuffed (R. 65) he was questioned by the agents who accused him of furnishing narcotics to the informant, Hom Way. Toy denied this, but said a person named Johnny who lived on Eleventh Avenue was selling narcotics and had a "piece" and described to the agents Johnny's house and bedroom and its location and mentioned he had been there the night before (R. 63).

One of the agents, accompanied by two police officers, then immediately went to the described house, found a Johnny Yee there, who turned over to them a quantity of heroin he took from a dresser drawer in his bedroom. The agent then arrested Yee (R. 63-64).

Immediately following his arrest, Yee told the agents the narcotics had been brought to his home three days before by Toy and a person known to him as "Sea Dog", and that they had been at his house on the evening of June 3d (R. 90).

At about 10:30 A. M. of the day of arrest, June 4th, Toy, while being questioned further at the narcotic bureau offices, identified petitioner Wong Sun as "Sea Dog" and was immediately taken by the agents to locate and point out Wong Sun's residence (R. 95-96).

Again there is some conflict in the testimony as to the manner in which the agents entered Wong Sun's premises, an upper flat.

Agent Wong testified he rang the door-bell, heard a buzzer, pushed open the door and asked a Chinese woman who appeared on an upper landing for Mr. Wong; that Betty Wong, petitioner's wife appeared at the top of the

stairway; that he started up the stairs and identified himself as a federal narcotic agent; that agent Casey followed behind and when told by Betty Wong that her husband was asleep in the back bedroom went there and placed him under arrest. Other agents, about six in number, followed Casey into the premises. Wong Sun was handcuffed and the premises were searched (R. 97-99).

Annie Leong, Wong Sun's sister-in-law, testified that when she responded to the bell ring and pressed the buzzer, Agent Wong appeared at the front door and asked for a Mr. Leong, the owner of the house; that when she informed him there was no Mr. Leong, that she was the owner, he said "Thank you" and believing he was leaving, she turned to go back upstairs, when someone grabbed hold of her and pulled her into the bedroom where Wong Sun and his wife were sleeping and that about six agents came in; she thought the agent mistook her for Wong Sun's wife, because they looked quite a bit alike (R. 78-87).

At no time did the agents have either a search warrant or a warrant of arrest (R. 34, 89).

On June 5th and June 9th, each of the petitioners was questioned separately by an agent at the office of the narcotic bureau. Questions and answers were reduced to written statements purporting to be confessions, but the petitioners, while acknowledging the correctness of the statements, refused to sign them (R. 66-72). The statements were admitted into evidence over petitioners' objection (R. 106). In the statements petitioners told of visiting Johnny's house on June 3d to smoke heroin: Wong Sun's statement told of procuring heroin for Toy to sell to Johnny and of driving with Toy to Johnny's house to deliver heroin. Toy's statement said that on occasions prior to June 1st he drove Wong Sun to Johnny's house to deliver heroin.

2. The Court of Appeals, Circuit Judge Hamley dissenting, affirmed the convictions (R. 146). The Court ruled, however, that the arrest of each petitioner was illegal since it was based on information received from an informer not known to be reliable and therefore was without probable cause (R. 140).

The Court held, nevertheless, that the illegality of the arrests did not render inadmissible the confessions (R. 141) or so contaminate the pre-confession statements as to prevent the use by the agents of the information given therein (R. 142), which led the agents to the finding of the heroin and the subsequent arrest of Wong Sun. The Court further held the confessions were sufficiently corroborated by other evidence (R. 143).

Circuit Judge Hamley, dissenting (R. 144), was of the opinion the convictions should be set aside because the government developed its case on the basis of information obtained from Toy after his illegal arrest.

Summary of Argument

(Principal Question Involved)

The government developed its entire case against petitioners through information obtained from petitioner Toy following his illegal arrest. The information led the agents to the finding of the heroin and to the identity and arrest of petitioner Wong Sun. Under the "fruit of the poisonous tree" doctrine of the *Silverthorne* and *Nardone* cases[1] the illegal arrest so contaminated Toy's statements as to prevent the use by the agents of the information given therein.

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[1] *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Nardone* v. *United States*, 308 U.S. 338.

ARGUMENT

1.

Information Obtained From a Defendant as the Result of an Illegal Arrest Cannot Be Used by the Government to Develop Its Case.

The Court of Appeals held the arrest of both petitioners was illegal (R. 140). Quoting from the Opinion (R. 139):

> "In this case, the officers went to Toy's laundry and home solely by reason of the statement of a Chinese, arrested a few hours before, that he had purchased narcotics from Toy. While the record does show that the agent said that he had known Hom Way for six weeks, it does not show in what way he had known him; there is no evidence that Hom Way had ever given any reliable information to the officers upon any previous occasion. In fact, there was evidence to the contrary; to wit, that they had not received any information from him on prior occasions. As this court said in *Rodgers* v. *United States,* supra [267 Fed. 2d 79] . . . 'where the officer makes an arrest without any knowledge of the commission of a crime except from an informer whom he does not know to be reliable, the courts have consistently held there is no reasonable ground for the arrest.' There is no showing in this case that the agent knew Hom Way to be reliable." [2]

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[2] California courts likewise have held an arrest is not based on probable cause when the only information possessed by the officer is secured from an informant who is not known to be reliable. *People* v. *Walker,* 165 Cal.App. 2d 462, 331 Pac. 2d 668; *People* v. *O'Neill,* 10 Cal. Rptr. 114.

It cannot be *assumed* that information given by an informant is reliable. *Wrightson* v. *United States,* 222 Fed.2d 556 (C.A.D.C.); *United States* v. *Castle,* 138 F. Supp. 436, 439 (D.C. Dist.Col.).

See also *Contee* v. *United States,* 215 F.2d 324 (C.A.D.C.),

The Court put aside the Government's contention that the events which transpired at Toy's house at 6:30 in the morning were sufficient to provide reasonable cause for the arrest, with the observation (R. 140):

> "These events have been set out earlier in this opinion. They are that after the agent had got the door of the laundry opened by stating that he wanted some laundry and after being told by Toy to come back at eight o'clock, he then pulled out his badge and said, 'I am a narcotics officer.' With that Toy closed the door and ran back into his bedroom. Admittedly the agent then forced the door and ran after Toy into the bedroom where he arrested him. We see nothing in the circumstances occurring at Toy's premises that would provide sufficient justification for his arrest without a warrant."[3]

Notwithstanding that the arrest of Toy was illegal, the Court of Appeals mistakenly ruled: "The illegal arrest

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Cockran v. *United States*, 291 F.2d 633 (C.A. 8), *Cervantes* v. *United States*, 263 F.2d 800, 804 (C.A. 9).

In *People* v. *Dawson*, 150 Cal.App. 2d 119, 310 P.2d 162, the California Supreme Court adopted the yard stick that "reliable" informant means a person whose information in the past led the officers to valid arrests.

In *People* v. *Witt*, 159 Cal.App. 2d 492, 324 P.2d 79, it was held an arrested narcotics offender is not considered a "reliable" informant.

[3] The fact Toy closed the door and ran back into his bedroom did not justify the forced entry of the agents. *Miller* v. *United States*, 357 U.S. 301; *United States* v. *Castle*, 138 F.Supp. 436 (D.C. Dist. Col.); *Gascon* v. *Superior Ct.*, 169 Cal.App. 2d 356, 337 P.2d 201; *Badillo* v. *Superior Ct.*, 46 Cal. 2d 269, 294 P.2d 23; *People* v. *O'Neill*, 10 Cal. Rptr. 114.

The officers broke in without first giving notice of their authority and purpose. *Miller* v. *United States*, 357 U.S. 301.

Entry was made by subterfuge, followed by force. *Gatewood* v. *United States*, 209 F.2d 789 (C.A.D.C.).

did not so contaminate the voluntary pre-confession statements so as to prevent the use by the officers of the information given therein" (R. 142).

The exclusionary rule, originating with *Weeks* v. *United States*, 232 U.S. 383 in 1914 has withstood the rigid test of time and today stands as an unmovable barrier against the constant threat of Constitutional impairment.

"To the exclusionary rule of Weeks v. United States there has been unquestioned adherence for now almost half a century." Mr. Justice Stewart in *Elkins* v. *United States*, 364 U.S. 206.

California, in 1955, joined with *Weeks* and adopted the exclusionary rule[4] and this Court in an historical pronouncement in June, 1961 made mandatory compliance with the exclusionary rule by all the states and reaffirmed that the exclusionary rule is of Constitutional origin and an essential part of the Fourth Amendment.[5]

"Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[6]

"Evidence obtained [by unreasonable search and seizure] must be excluded * * * since in the absence of that rule of

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[4] *People* v. *Cahan*, 44 C.2d 434, 282 P.2d 905:

"We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." (Id. at 911-912.)

[5] *Mapp* v. *Ohio*, 367 U.S. 643.

[6] Mr. Justice Stewart in *Elkins* v. *United States*, 364 U.S. 206, 217.

evidence the Amendment would have no effective sanction."[7]

"To permit an officer • • • to acquire evidence illegally and in violation of sacred constitutional guaranties, and to use the illegally acquired evidence in the prosecution • • • strikes at the very foundation of the administration of justice, and where such practices prevail makes law enforcement a mockery."[8]

A further compelling reason underlies the exclusionary rule.

"But there is another consideration—the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in Olmstead v. United States, 277 U.S. 438, at 469, 471, more than 30 years ago. 'For those who agree with me', said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U.S. at 470 (Dissenting opinion.) 'In a government of laws', said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against

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[7] Dissenting opinion of Mr. Justice Douglas in *Wolf* v. *Colorado*, 338 U.S. 26.

[8] *Atz* v. *Andrews*, 84 Fla. 43, 52, 94 So. 329, 332.

that pernicious doctrine this Court should resolutely set its face.'" 277 U.S. at 485 (Dissenting opinion).[9]

"The exclusionary evidence rule is morally correct and appropriate to a free society. It is a rule naturally suggested by the Constitution itself. * * * It is the most effective remedy we possess to deter police lawlessness.

A moral position of a high order gives support to the rule. It is unseemly that the government should with one hand forbid certain police conduct and yet, at the same time, attempt to convict accused persons through use of the fruits of the very conduct which is forbidden.

The moral point not only rests upon an ethical judgment that government hypocrisy is an evil to be avoided for its own sake, but also it take into account the serious undermining of trust in government which is an unavoidable consequence of any scheme permitting the state to benefit from unlawful conduct. * * * Few things are more subversive of free institutions than a mistrust of official integrity. When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place." [10]

Professor Paulsen in his illuminating discussion of the exclusionary rule further emphasized the involvement of the courts in dealing with illegally obtained evidence.[11]

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[9] *Elkins* v. *United States*, 364 U.S. 206, 222-3.

[10] Professor Monrad G. Paulsen "The Exclusionary Rule and Misconduct by the Police", Vol. 52, No. 3, September-October, 1961, pp. 257-8, Journal of Criminal Law, Northwestern University School of Law.

[11] "The use of illegal evidence involves the courts, the branch of government most dependent upon popular respect, in a kind of

This Court in *Mapp* v. *Ohio*, 367 U.S. 643, reassuringly re-asserted the deep rooted principles, the foundation of the exclusionary rule:

"• • • if illegally seized evidence can be used against one accused of crime 'the protection of the Fourth Amendment • • • is of no value, and, so far as those thus placed are concerned, might as well be stricken from the constitution.'"

"In the Weeks case, 1914, the Supreme Court for the first time held that in a Federal prosecution the Fourth Amendment barred the use of illegally obtained evidence and the Supreme Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific and constitutionally required —even if judicially implied, deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a form of words.' Holmes, J., Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). It meant, quite simply, that 'convictions by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .' Weeks v.

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ratification of illegal conduct. Judge Traynor of the Supreme Court of California has observed, 'The success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced.' [People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955).] When the prosecutor takes evidence gained by the lawless enforcement of the law and places it before a court, that court by accepting the offer of proof becomes inevitably drawn into the lawlessness. At least, many of the community's most scrupulous and noble will see it so. Judge Condon of Rhode Island has made the point in these words: 'If courts receive evidence knowing that it has been unconstitutionally obtained, they . . . give judicial countenance to the government's violation of the Constitution.' [State v. Olynick, 113 A.2d 123, 131 (R.I. 1955) (dissenting opinion).] • • • The exclusionary rule dissociates the court from any police policy of systematic violation of law."

(Professor Paulsen in Journal of Criminal Law, *supra*, 258.)

United States, supra, at 392, and that such evidence 'shall not be used at all.' Silverthorne Lumber Co. v. United States, supra, at 392" (at 648).

" • • • the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States,* 357 U.S. 301, 313 (1958) (at 658).

"But, as was said in Elkins, 'there is another consideration—the imperative of judicial integrity'. 364 U.S. at 222 . . . Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence" (page 659).

Under the exclusionary rule evidence obtained in violation of a defendant's constitutional rights to be free from unreasonable arrests, searches and seizures is inadmissible in the trial of a criminal case. Such evidence is not limited to physical or tangible evidence or evidence directly obtained by illegal means. Ever since the decision in the *Silverthorne* case by this Court[12] federal courts and most state courts have consistently ruled out the "derivative" use of illegally seized evidence—evidence discovered by the Government through "clues and leads" produced by illegally seized evidence. Unless this were so, the effectiveness of the exclusionary rule would be impaired and the Constitutional rights not only jeopardized, but destroyed.

The "fruit of the poisonous tree" doctrine introduced in the *Silverthorne* case and followed in the *Nardone* v. *United States*[13] is applicable here. The Court of Appeals erroneously failed to apply it.

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[12] *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385.

[13] *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385; *Nardone* v. *United States,* 308 U.S. 338; *McDonald* v. *United States,* 335 U.S. 451. (See concurring opinion of Mr. Justice Jackson.)

Circuit Judge Hamley, in his dissenting opinion, correctly applying the "fruit of the poisonous tree" doctrine, observed: "The government developed its case on the basis of information obtained from Toy at his home immediately after enforcement officers made an illegal entry into that home" (R. 144).

In the *Silverthorne* case, this Court said: " . . . the government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had," and held: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all * * * the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

In the *Nardone* case, this Court again plainly and forcefully pointed out that: "To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty. What was said in a different context in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 is pertinent here. 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence acquired shall not be used before the Court, but that it shall not be used at all.'

"Here, as in the Silverthorne case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively."

The entire case against petitioners was a "fruit of the poisonous tree".

"Having forced an entry without either a search warrant or an arrest warrant, to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality." [14]

"The government cannot violate the Fourth Amendment —in the only way in which the government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States [232 U.S. 383]. Nor can the government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, * * *, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States." [15]

As Mr. Justice Frankfurter put it:

"The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet." [16]

The exclusionary principle applies to the "fruit of the poisonous tree" as well as to the tree itself. It only becomes necessary to discover and isolate evidence that is the contaminated fruit to suppress and exclude it.

Courts of Appeal in other circuits, federal district and state courts, have consistently adhered to the holdings in

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[14] From concurring opinion of Mr. Justice Jackson in *McDonald* v. *United States*, 335 U.S. 451.

[15] From the opinion in *Walder* v. *United States*, 347 U.S. 62.

[16] *On Lee* v. *United States*, 343 U.S. 747, 759.

the *Silverthorne* and *Nardone* cases in applying the "fruit of the poisonous tree" doctrine, under varying facts and circumstances.

In *Nueslein* v. *Dist. of Columbia*[17] Circuit Judge Vinson (later Chief Justice) said:

"The Amendment does not outline the method by which the protection shall be afforded, but some effective method must be administered; * * * A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home."

In *Somer* v. *United States*[18] the Court observed:

"Somer's whereabouts was unknown to the officers * * *, it was the information unlawfully obtained which determined their (officers') course. Since, therefore, the seizure must be set down to information which the officers were forbidden to use, it was itself unlawful under well-settled law." (Citing the *Silverthorne* and *Nueslein* cases.)

In *McGinnis* v. *United States*[19] the Court ruled:

"We find no basis in the cases or in logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction. Moreover, it seems to us that the protection afforded by the Constitution against unreasonable search and seizure would be narrowed down to a virtual nullity by any such view of the law, which in

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[17] 115 F.2d 690 (C.A.D.C.).

[18] 138 F.2d 790 (C.A. 2).

[19] 227 F.2d 598 (C.A. 1).

effect would grant to the victims of unreasonable search and seizure the rather unsubstantial right to be convicted on the basis of evidence which was illegally observed rather than evidence which was illegally taken."

In *United States* v. *Kempe*[20] the Court in following the rule laid down by this Court in the *Nardone* case, said:

"The United States Supreme Court has emphatically laid down the rule that the Government cannot use evidence against a defendant, the knowledge of which evidence had its origin in the invasion of the defendant's rights, and is the fruit of a 'poisonous tree'."

The California Supreme Court has strongly supported and consistently followed the "fruit of the poisonous tree" doctrine of the *Silverthorne* and *Nardone* cases.[21]

In *Bolger* v. *Cleary*[22] a Federal Court enjoined a state official from testifying in a state proceeding to information learned by him as a result of his co-operation with federal officials in an illegal search and seizure and an illegal detention.

In *Silverman* v. *United States*[23] this Court barred admission of testimony growing out of the use of an electronic device that penetrated the wall of defendant's premises.

In *Simmons* v. *State*[24] where the charge was illegal possession of intoxicating liquors, officers illegally searched

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[20] 59 F. Supp. 905 (Dist. Ct. N.D. Iowa).
See also *Fraternal Order of Eagles* v. *United States*, 57 F.2d 93 (C.A. 3).

[21] *People* v. *Berger*, 44 Cal.2d 459, 282 P.2d 509; *Badillo* v. *Superior Court*, 46 Cal.2d 269, 294 P.2d 23; *People* v. *Dixon*, 46 Cal.2d 456, 296 P.2d 557.

[22] 293 F.2d 368 (C.A. 2).

[23] 365 U.S. 505.

[24] Okla. Cr. 277 P.2d 196.

defendant's automobile and found some whiskey, and as a result followed tracks of defendant's automobile about 250 feet to an overturned boat in the pasture which when searched revealed an additional quantity of whiskey.

The court, in citing and relying upon the *Silverthorne* and *Nardone* cases, held the search was illegal from beginning to end—"void ab initio"—the search of the pasture could not be disassociated from the search of the automobile—that it was one continuous search and the finding of the liquor in the pasture was a direct outgrowth of the illegal search of the automobile.

The court said: "In the latter (Nardone) case the United States Supreme Court held that a conviction sustained on evidence secured through leads obtained by reason of an illegal search and seizure cannot be upheld."

In questioning Toy following his illegal arrest, "links and leads tending to establish"[25] the Government's case were discovered.

In *State* v. *Hunt*[26] the Court had this to say:

"As to this matter, the Supreme Court of Mississippi said in Quan v. State, 185 Miss. 513, 188 So. 568, 569: 'We may concede, for the purposes of this case, (1) that everything of an inanimate or insensate nature seen, or which knowledge is acquired by or through the use of any of the five senses by the officers or those cooperating with them, during the course of an illegal search, is barred from being received in evidence; and (2) that any statements or conversations heard by the officers during the course of an illegal search * * * are likewise barred * * * and (3) there is also barred, as a matter of course, any statement made by the accused * * * .'"

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[25] *People* v. *Laino*, 10 N.Y.2d 161.

[26] 280 S.W.2d 37, 40-41.

"It is, of course, now settled law in federal courts that evidence is inadmissible not only when obtained during an illegal search, but if derived from information gained in an illegal search." [27]

Testimony of witnesses discovered and brought to light in the course of an illegal search of defendant's premises is excluded as the derivative of police illegality.[28]

The crystal clear summation of Circuit Judge Hamley illustrates the vice of allowing the convictions of petitioners to stand (R. 144-5):

"In my view the convictions should be set aside because as to both appellants the government developed its case on the basis of information obtained from Toy at his home immediately after enforcement officers made an illegal entry into that home. The fact that the information was derived from voluntary statements made by Toy at that time and place, rather than as a result of the seizure of physical objects (Silverthorne Lumber Co. v. United States, 251 U.S. 385) or observations made by law enforcement officers while illegally on the premises (McGinnis v. United States, 1 Cir. 227 F. 2d 598), seems to me immaterial.

"As I understand it, the test of the 'fruit of the poisonous tree' doctrine (Nardone v. United States, 308 U.S. 338) is whether the government seeks to avail itself of knowledge which it would not have had but for the lawless conduct of enforcement officers. For all that is shown in this record, the government would not have known of Johnnie Yee and so built its case had not an illegal entry of Toy's home been effected.

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[27] *United States* v. *Krulewitch*, 167 F.2d 943, 945 (C.A. 2).

[28] *People* v. *Martin*, 382 Ill. 192, 46 N.E.2d 997; *People* v. *Schmoll*, 383 Ill. 280, 48 N.E.2d 933; *People* v. *Albea*, 2 Ill.2d 317, 118 N.E.2d 277; *People* v. *Schaumloffel*, 53 Cal.2d 96, 346 P.2d 393; *People* v. *Mills*, 148 Cal.App.2d 392, 306 P.2d 1005.

"The guarantees of the Fourth Amendment are too fundamental to warrant hair-splitting distinctions between information based on physical evidence obtained or observations made at the scene of an illegal entry and information based on voluntary statements by the defendant at the scene of the illegal entry. The chances are always pretty good that law enforcement officers can obtain valuable leads during the course of adroit questioning. If such leads are not to be regarded as contaminated harvest, the 'fruit of the poisonous tree' doctrine will no longer serve its designed purpose of discouraging Fourth Amendment violations."

Professor Paulsen's succinct interpretation of the exclusionary rule is worthy of repetition:[29]

"The basic political problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty. The exclusionary rule is the best and the most practical way for the law to deter those officials who would make inroads upon that security. It is morally right. It provides frequent opportunities for litigation of the issues. It is the best tool we have to give life to the constitutional safeguards against unreasonable interferences by the professional agencies of law enforcement."

In *McNabb* v. *United States*[30] this Court announced:

"Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress

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[29] Professor Paulsen in Journal of Criminal Law, *supra*, at 264.

[30] 318 U.S. 332, 345.

has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."

Summary of Argument

(Related Questions)

1.

Petitioners' Confessions Following Their Illegal Arrests Were Inadmissible as the Product of Their Illegal Arrests.

2.

The Confessions, Assuming They Were Properly Admissible in the Trial Were Not Sufficiently Corroborated by Other Independent Evidence as Required.

ARGUMENT

1.

All Illegally Obtained Evidence Is Inadmissible Because of the Fourth and Fifth Amendments.[31]

Petitioners' confessions made following their illegal arrest were inadmissible under the "fruit of the poisonous tree" doctrine, as products of their illegal arrests.

In *Nueslein* v. *District of Columbia*, *supra*, the Court was of the opinion that admissions stemming from an illegal arrest should be excluded from evidence. There the Court reasoned that "A confession does not make good a search illegal at its inception," citing *U. S.* v. *Setaro*, 37 F. 2d 134 (D.C. Conn.), and further: "This is part of the

[31] *Weeks* v. *United States*, 232 U.S. 383; *People* v. *Cahan*, 44 Cal.2d 434, 282 P.2d 905.

broader rule that an illegal search cannot be legalized by what it brings to light," citing *Byars* v. *U. S.*, 273 U.S. 28, and concluded: "That rule should not be narrowed even though an admission or confession is obtained."

This Court has ruled that the Fifth Amendment protects every person from incrimination by use of evidence obtained through search and seizure made in violation of the Fourth Amendment.[32]

In *People* v. *Macias*[33] while under arrest defendant admitted he had four marijuana cigarettes on his person. The Court said: "Thus coerced, he confessed. That 'confession was the immediate product of the unlawful arrest.'"

In *United States* v. *Arrington*,[34] the Court held:

"Thus, it is the rule that proof of a confession, made during a search, or contraband found as a result thereof cannot be relied upon in support of the legality of the search. By the same token, it would seem that the statement made by defendant in connection with the search could not be utilized as proof of consent (the sole premise relied upon as justifying the search)."[35]

A confession made following an illegal arrest is tainted "fruit of the poisonous tree". It is obtained in a manner through duress and coercion. In *Weeks*, *supra* (at 391-2) this Court made it clear that "The tendency of those who execute the criminal laws • • • to obtain convictions by

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[32] *Agnello* v. *United States*, 269 U.S. 20.

[33] 180 Cal. App.2d 193, 4 Cal. Rept. 256. See also *United States* v. *Watson*, 189 F.Supp. 776 (D.C. So. Dist. Cal.).

[34] 215 F.2d 630, 636 (C.A. 7).

[35] To same effect—*Takahashi* v. *United States*, 143 F.2d 118, 122 (C.A.9); *Worthington* v. *United States*, 166 F.2d 557, 566 (C.A. 6); *United States* v. *Pollack*, 64 F.Supp. 554, 558 (D.C.Dist. N.J.).

means of unlawful seizures and enforced confessions * * * should find no sanction in the judgments of the courts."

A confession made following an illegal arrest should be excluded as the product of an illegal arrest—the "fruit of the poisonous tree". It is contaminated by elements of duress, coercion and moral compulsion exerted upon a defendant while under the yoke and pressure of an illegal arrest, much as in the case of a drawn "consent" by a defendant to permit an agent to search his automobile or premises for evidence, extracted from the defendant while under illegal arrest.[36]

Consent to a search is in effect a waiver of the Constitutional protection of the Fourth Amendment.

Because consent involves waiver of basic constitutional rights:

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." (*Johnson* v. *Zerbst*, 304 U.S. 458.)

McNabb v. *United States*,[37] as reaffirmed by *Mallory* v. *United States*[38] operates to exclude all confessions elicited during prolonged pre-commitment detention, whether or not they appear to be voluntarily made.

In *Mallory* this Court said (at 453) quoting in part from *McNabb*:

"* * * the Court held that police detention of defendants beyond the time when a committing magistrate was readily

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[36] *United States* v. *Kidd*, 153 F.Supp. 605 (D.C.W.D. La.); *People* v. *Wilson*, 145 Cal.App.2d 1, 7, 301 P.2d 974, 978; *Judd* v. *United States*, 190 F.2d 649, 651 (C.A.D.C.); *Channel* v. *United States*, 285 F.2d 217, 221 (C.A. 9).

[37] 318 U.S. 332.

[38] 354 U.S. 449.

accessible constituted 'wilful disobedience of law';" again (at 453) "the requirement of Rule 5(a) is part of the procedure devised by Congress for safeguarding individual rights."

In *McNabb* this Court affirmed (at 339):

" * * * a conviction * * * the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."

"Convictions following the admission into evidence of confessions which are involuntary, (i.e.) the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of criminal law. * * * the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." [39]

"The fact that the suspect was wrongfully detained, albeit lawfully arrested, is enough to exclude 'voluntary' incriminating statements. (Citing *Mallory* v. *United States*, 354 U.S. 449, 455 and *Upshaw* v. *United States*, 335 U.S. 410, 413.)

In the face of this development, * * * what still can be said for a federal rule which admits into evidence 'voluntary' statements elicited from a wrongfully arrested person —one whose detention is illegal, aye unconstitutional, ab initio?"

"McNabb (McNabb v. United States, 318 U.S. 332, 345) tells us that a conviction resting on evidence secured in violation of 'the procedure which Congress has commanded

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[39] Mr. Justice Frankfurter in *Rogers* v. *Richmond*, 365 U.S. 534, 540-41.

cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' How is it then, that convictions resting on damaging statements secured in violation of the procedure which the Constitution has commanded somehow can stand without involving the same federal courts in the same 'willful disobedience'? If it 'would stultify the policy which Congress has enacted into law to have federal convictions on incriminating statements obtained in violation of prompt pre-commitment rules, why does it not stultify the policy which the Constitution has enacted into law to base federal convictions on statements secured in violation of the Fourth Amendment?'"

"• • • it is far from disputed what the consideration underlying the McNabb-Mallory rule is. Thus, two experts on the rule (Hogan & Snee—The McNabb-Mallory Rule, 47 Geo. L.J. 1, 11, 12, 20 (1958)) • • • conclude that the 'real roots of the McNabb rule' are found in a refusal to countenance 'trials which are the outgrowth or fruit of the Government's illegality' since they 'debase the processes of justice.' Certainly this is one of the major considerations underlying the rule. To the extent that it is, to the extent that the rule does manifest the Court's desire to avoid 'contamination by plunging into the cesspool itself' unconstitutional police conduct obviously taints the administration of justice more than does merely illegal police conduct."[40]

As further pointed out by Professor Kamisar (at 112, Ill. Law Forum, *supra*):

"The issue, then, is not simply whether an illegal arrest renders an otherwise trustworthy confession untrustworthy

[40] Professor Yale Kamisar "Illegal Searches etc." U. of Ill. Law Forum, Vol. 1961, Spring, Number 1, at 140-142.

as a matter of law * * * but whether the courts should nevertheless exclude such a confession in order * * * to deter similar police illegality in the future or to avoid sanctioning the methods by which the evidence was obtained."

In *Rogers* v. *Superior Court*[41] the Court pointed out:

"There is a basic distinction between evidence seized in violation of the search and seizure provisions of the Constitution of the United States and the Constitution of California and the laws enacted thereunder, and voluntary statements made during a period of illegal detention. * * * Nevertheless, there is lacking the essential connection between the illegal detention and the voluntary statements made during that detention that there is between the illegal search and the evidence obtained thereby, or between the coercion and the confession induced thereby. The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion."

By virtue of the Fourteenth Amendment, a confession is inadmissible in a capital crime where the defendant is denied assistance of counsel—a violation of a constitutional right.[42]

A confession following an illegal arrest likewise should be inadmissible since there has been a violation of a Constitutional right—Fourth Amendment.[43]

In *Miller* v. *United States*[44] this Court said:

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[41] 46 Cal.2d 3, 291 P.2d 929, 933.

[42] *Spano* v. *New York*, 360 U.S. 315.

[43] *Elkins* v. *United States*, *supra*; *Mapp* v. *Ohio*, *supra*.

[44] 357 U.S. 301.

"However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."

"Here, too, it should be remembered that 'officers should not be encouraged to proceed in an irregular manner on the chance that all will end well'; *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 694 (C.A.D.C.) 1940 that police illegality 'is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.' *United States* v. *Di Re*, 332 U.S. 581, 595 (1948)."

2.

The Only Independent Evidence Aside From the Admissions, Declarations and Confessions of Petitioners Was Testimony of the Agent as to Finding Narcotics in Yee's House.

A confession of a defendant is not sufficiently corroborated by evidence of narcotics found in another person's home, to prove a charge of violation of 21 U.S.C. Sec. 174.[45]

The Court of Appeals in affirming the convictions erroneously concluded: "In this case the narcotics were found in the residence of Yee. This in itself establishes that someone was guilty of concealment and transportation of narcotics in violation of 21 U.S.C.A. Sec. 174" (R. 143).

In the *Landry* case, *supra*, the Court ruled that the finding of narcotics in the possession of a third person was not

[45] *United States* v. *Landry*, 257 F.2d 425 (C.A. 7); *Martin* v. *United States*, 264 F. 950 (C.A. 8).

sufficient corroboration of extra-judicial declarations or admission.

The statute[46] in part provides:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The record is void of evidence to show petitioners to have or to have had possession of the narcotics so as to authorize a reliance upon the statutory presumption; this necessary element of proof could not be supplied by petitioners' admissions or confessions, but required independent evidence, which was lacking.

In the *Landry* case, *supra*, the Court explained:

"Cases are cited by the government in support of the principle that the admission of a crime is sufficient to support a conviction if it is corroborated by independent evidence of the corpus delicti. We see no point in this argument. Possession of a narcotic is not an offense. The statutory presumption which arises from unexplained possession is only a rule of evidence.

"Fact of possession may be shown by circumstantial evidence • • • but no court, so far as we are aware, has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person.

"The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby in effect shifts the burden of proof to a defendant, is drastic, no

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[46] 21 U.S.C. 174.

doubt designed to meeting a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the Government would have the Court presume the fact." [47]

Conclusion

We respectfully submit that the Court of Appeals erred in affirming the judgment of conviction of petitioners and said judgment of conviction of petitioners should be reversed.

Respectfully submitted,

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Dated: December 21, 1961

[47] See also *Naftsger* v. *United States*, 200 Fed. 494 (C.A. 8).